IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 25, 2006

STATE OF TENNESSEE v. LARRY EUGENE CULPEPPER

Direct Appeal from the Circuit Court for Maury County
No. 13965 Stella Hargrove, Judge

No. M2005-00685-CCA-R3-CD - Filed July 7, 2006

Defendant, Larry Eugene Culpepper, was indicted on one count of rape of a child, a Class A felony. Following a jury trial, the jury found Defendant not guilty of the charged offense and guilty of the lesser included offense of aggravated sexual battery, a Class B felony. In his appeal, Defendant argues that (1) the evidence was not sufficient to support his conviction; (2) the trial court erred in finding that the victim was competent to testify as a witness; (3) the trial court erred by conducting a bifurcated proceeding during which enhancement factors were submitted to the jury for its determination; and (4) that the trial court erred in sentencing the Defendant to more than the minimum sentence for a Class B felony. After review, we affirm Defendant's conviction of aggravated sexual battery. Although the trial court erred in conducting a bifurcated sentencing hearing, we conclude that such error was harmless error beyond a reasonable doubt, and also affirm the trial court's judgment of sentencing.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Jennifer Lynn Thompson, Nashville, Tennessee, for the appellant, Larry Eugene Culpepper.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Christi Thompson, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

S.L., the minor victim in this case, will be referred to by her initials. S.L. testified that she was born on April 3, 1992, and she was eleven years old when the offense occurred. S.L. said that she lived for about two and one-half weeks in Tennessee, during which time the offense occurred.

S.L. said that she lived in a trailer on a "bumpy road" with her mother, Jennifer Lawson, and Defendant, her stepfather. Ms. Lawson worked while Defendant, who was unemployed, stayed with S.L.

One day, S.L. said that she went to Defendant's bedroom wearing a tee-shirt and panties. Defendant was dressed in a shirt and shorts. S.L. took her panties off, and Defendant rubbed baby oil on what the victim referred to as her "bootie." S.L. said that she pulled her panties back up, and Defendant laid down on the bed while S.L. licked his chest. Defendant took off his shorts. S.L. said she rubbed baby oil on Defendant's "mushroom," and then put her mouth on "the mushroom top." Defendant told her that "it felt good." The incident lasted about twenty or thirty seconds, and then she stopped. Defendant told S.L. not to tell her mother, or she would get into trouble.

On cross-examination, S.L. said that Defendant and her mother married after they moved to Tennessee. S.L. said that she could not remember the name of her elementary school in Tennessee or her teacher's name. S.L. did not know her mother's or Defendant's birthdays. S.L. said her mother divorced Defendant before she and her mother moved from Tennessee after the incident.

On redirect examination, S.L. identified Defendant as the perpetrator of the offenses.

Jennifer Lawson testified that S.L. was born on April 3, 1992, and was twelve years old at the time of trial. Ms. Lawson said that she, S.L., and Defendant moved to Tennessee in May 2003. S.L. attended school for about two weeks before the school year ended. Ms. Lawson said that she moved to Tennessee because she believed that the school system had more services to offer her daughter than the Georgia school system, and because she thought she would have better job opportunities. Ms. Lawson said that she and Defendant married in Phenix City, Alabama, before they moved to Tennessee. Ms. Lawson said that she did not divorce Defendant after the incident because she did not have enough money to hire an attorney to represent her.

Ms. Lawson said that her daughter and a friend were playing in the front yard one afternoon. The girls were arguing, and Ms. Lawson asked what they were discussing. S.L. told her mother what had happened in Defendant's bedroom. Ms. Lawson went back into the trailer and noticed the baby oil on a night stand in the bedroom. Ms. Lawson said that she asked Defendant how he could have committed the offense. Defendant jumped up off the couch and asked Ms. Lawson to let him explain, and told her that it was not as she thought it was.

Ms. Lawson said that she packed some clothes, and she and S.L. left the trailer. Ms. Lawson called 911 from her car. Detective Tony Bailey met Ms. Lawson and S.L. at the hospital, and he interviewed S.L. Ms. Lawson said that after Defendant vacated the trailer, she and S.L. lived in the trailer until September 2003.

On cross examination, Ms. Lawson said that Defendant was seriously injured at work before they were married. Ms. Lawson was aware that Defendant received a workers' compensation settlement as a result of his injuries, but she denied that she knew how much Defendant received.

Ms. Lawson said that she knew that Defendant had filed a civil lawsuit against the individuals who were driving the fork lift that injured him, and that he was seeking one million dollars in damages. Ms. Lawson said that Defendant received Social Security disability, and that S.L. received approximately $447.00 per month from the Social Security Administration as Defendant's step-daughter.

Ms. Lawson said that she filed for bankruptcy protection in 1999. Ms. Lawson acknowledged that before the family moved to Tennessee, some money had disappeared from the insurance agency where she was an employee. Ms. Lawson, however, said that she "took care of it," and no charges were filed. Ms. Lawson said that Defendant misappropriated the money, but she acknowledged that she did not file a police report on the incident.

Ms. Lawson acknowledged that she told the social worker with the Department of Children's Services that S.L. had masturbated before, but denied that she said that S.L. had been masturbating since she was four years old. Ms. Lawson acknowledged that S.L. had "flashed" another child one time as they were playing after school by pulling up her shirt.

On redirect examination, Ms. Lawson said that S.L. had epilepsy and had been hospitalized over twenty-seven times after suffering seizures. S.L. also had attention deficit disorder. Ms. Lawson said that the services offered in the Tennessee school system had helped improve S.L.'s performance at school.

Detective Bailey testified that he did not order a rape kit because there was no evidence of penetration, and he did not perform any other DNA testing because the incident had occurred three days before S.L. told her mother.

Detective Bailey said that Defendant voluntarily came to the police station the next day to give a statement. Detective Bailey read Defendant his *Miranda* rights, and Defendant signed a written waiver. Detective Bailey said that Defendant was "nervous" and "shaky" and told Detective Bailey that he just "wanted to get this over."

Defendant's statement was read into the record. In his statement, Defendant said that he was asleep in his bed when S.L. got into the bed with him. Defendant said that S.L. was nude, and that she started to rub his penis with her hand. Defendant thought it was his wife. He reached down for her hand and realized that it was S.L. Defendant said that he jumped out of bed and told S.L. to put some clothes on and go to her room. Defendant said that he talked to S.L. later and told S.L. "that is not what fathers and daughters do." Defendant said he had not had an opportunity to tell Ms. Lawson about the incident before S.L. told her.

On cross-examination, Detective Bailey said that he was aware that the report from the Department of Children's Services stated that it was possible that the victim had been sexually abused before Defendant began living with her. Detective Bailey said that he had not investigated

this finding further, and he had no reason to suspect that someone other than Defendant committed the charged offense.

II. Sufficiency of the Evidence

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S.307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.; State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Defendant was convicted of aggravated sexual battery which is defined, as relevant here, as unlawful sexual contact with the defendant by a victim when the victim is less than thirteen years of age. T.C.A. § 39-13-504(a)(4). "'Sexual contact' includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." *Id*. § 39-13-501(6).

Defendant argues that the State failed to establish the elements of the offense of aggravated sexual battery. Relying on *Wooten v. State*, 203 Tenn. 473, 314 S.W.2d 1, 5 (1958), Defendant contends that his statement to the police concerning the offense, while including some inculpatory comments, was not sufficiently corroborated to support his conviction. S.L. testified that Defendant laid down on the bed in his bedroom and took off his shorts. S.L. said she rubbed baby oil on Defendant's "mushroom," and then put her mouth on it. Defendant told her that "it felt good." The incident last about twenty or thirty seconds. S.L. and her mother testified that S.L. was born on April 3, 1992, and was eleven years old at the time of the offense.

Defendant argues that the State did not prove beyond a reasonable doubt that S.L. touched an "intimate part," arguing that S.L. could have been referring to a scar or a tattoo when she testified that she put her mouth on Defendant's "mushroom top." During her direct examination, S.L. testified as follows:

[PROSECUTOR:]	Okay, in their bedroom on the bed. All right. Then what happened.
[S.L.]	Then [Defendant] took off his shorts, and I put some baby oil on his mushroom top, rubbed it in, and then put my mouth on the mushroom top.
[PROSECUTOR:]	On the mushroom top. Okay. Now, again we are talking about different names that people have for things. Where is his mushroom top?
[S.L.]:	Below his stomach.
[PROSECUTOR:]	Okay. So are you talking about something that is a part of his body?
[S.L.]:	Yes, ma'am.
[PROSECUTOR:]	And, again, a few minutes ago you were talking about some clothing that everybody had on. When you say you touched the mushroom top, are you talking about skin or was there clothing?
[S.L.]:	Skin.
[PROSECUTOR:]	So you actually saw the mushroom top?
[S.L.]:	Yes, ma'am.
[PROSECUTOR:]	When you did this; when you put your mouth on this, did [Defendant] say anything?
[S.L.]:	It felt good.

A person's "intimate parts" includes "the primary genital area, groin, inner thigh, buttock or breast of a human being." T.C.A. § 39-13-501(2). Based on the foregoing, we conclude that S.L.'s testimony concerning the incident was sufficient for a rational trier to fact to find beyond a reasonable doubt that S.L. touched Defendant on an intimate part, and that such contact could be reasonably construed as being for the purpose of Defendant's sexual arousal or gratification.

Although phrased as a sufficiency of the evidence argument, Defendant essentially challenges the efficacy of the State's election of offenses. Defendant argues that because he was convicted of the lesser included offense of aggravated sexual battery instead of rape of a child, it is impossible

to know whether the jury convicted him because of the act of fellatio or the uncharged act of touching the victim's "bootie," or bottom, immediately before engaging in the charged offense.

The indictment charged Defendant with "on or about the 19th day of July, 2003 . . . unlawfully and intentionally, knowingly or recklessly, sexually penetrat[ing] [S.L.], a person less than thirteen (13) years of age, in violation of Tennessee Code Annotated 39-13-522." Prior to trial, the trial court conducted a hearing pursuant to Rule 404(b) of the Tennessee Rules of Evidence concerning the admissibility of evidence of other uncharged sex crimes against the victim. Defense counsel objected to S.L.'s potential testimony concerning any sexual contacts with Defendant which allegedly occurred both in Georgia and Tennessee, other than the charged offense. The trial court ruled inadmissible any evidence of uncharged sexual contacts with the victim which occurred outside the time frame of the indictment, and limited the evidence to the sexual contacts, including the touching of the victim's bottom, which occurred immediately before the act of fellatio.

Where there is evidence at trial that the defendant has committed multiple offenses against the victim, the doctrine of election requires the State to elect the facts upon which it is relying to establish a charged offense. *State v. Johnson*, 53 S.W.3d 628, 630 (Tenn. 2001) (citations omitted). "The election requirement safeguards the defendant's state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence." *Id.* at 631 (citing *State v. Brown*, 992 S.W.2d 389, 391 (Tenn. 1999)).

Because the election requirement is "fundamental, immediately touching the constitutional rights of the accused," an election of offenses is mandated whether or not the defendant requests an election. *Burlison v. State*, 501 S.W.2d 801, 804 (Tenn. 1973). Rather, it is incumbent upon the trial court even absent a request from the defendant to ensure that the State properly makes an election in order to avoid a "'patchwork verdict' based on different offenses in evidence." *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn. 1993).

Defendant did not challenge the State's election of offenses in his motion for new trial, and the issue is thus waived. *See* Tenn. R. App. P. 3(e). Nonetheless, even if the issue was not waived, any error would be harmless error beyond a reasonable doubt.

The parties agreed out of the presence of the jury that the conduct relied upon by the State to support the charge of rape of a child was the act of fellatio. The trial court, however, failed to instruct the jury about the State's election of offenses. Nonetheless, this Court has previously determined that a trial court's failure to properly instruct the jury about the State's election may be harmless "where the prosecutor provides during closing argument an effective substitute for the missing instruction." *State v. William Darryn Busby*, No. M2004-00925-CCA-R3-CD, 2005 WL 711904, *6 (Tenn. Crim. App., at Nashville, Mar. 29, 2005), *no perm. appeal filed*, (citing *State v. James Arthur Kimbrell*, No. M2000-02925-CCA-R3-CD, 2003 WL 1877094, at *23 (Tenn. Crim. App., at Nashville, Apr. 15, 2003), *no perm. appeal filed*; *State v. Michael J. McCann*, No. M2000-2990-CCA-R3-CD, 2001 WL 1246383, at *5 (Tenn. Crim. App., at Nashville, Oct. 17. 2001), *perm. to appeal denied* (Tenn. Apr. 1, 2002); *State v. William Dearry*, No. 03C01-9612-CC-00462, 1998

WL 47946, at *13 (Tenn. Crim. App., at Knoxville, Feb. 6, 1998), *perm. to appeal denied* (Tenn. Jan. 19, 1999)).

In the case *sub judice*, the prosecutor clearly identified for the jury in both opening and rebuttal closing argument that it was the act of fellatio on which the State was seeking a conviction. Defense counsel focused her argument on the act of fellatio, contending that the victim's use of the words "mushroom top" did not sufficiently establish that the victim touched Defendant's penis with her mouth. In its rebuttal closing argument, the State reviewed the evidence presented at trial for each element of the offense of rape of a child based on the act of fellatio. Defendant was charged with only one count of rape of child. The jury found Defendant not guilty of the charged offense and guilty of the lesser offense of aggravated sexual battery. This does not imply, however, that the jury was confused about which conduct the State elected to support a conviction. Based on our review of the entire record in this matter, we conclude that any error was harmless beyond a reasonable doubt, and that the jury convicted Defendant of aggravated sexual battery based upon the conduct elected by the State. Defendant is not entitled to relief on this issue.

III. Competency of the Victim as a Witness

Defendant argues that the victim failed to demonstrate that she understood the meaning of an oath or comprehended the seriousness of the proceeding. Defendant points to several inconsistencies in the victim's testimony and her inability to recall certain details of her life in Tennessee at the time the incident occurred.

Rule 601 of the Tennessee Rules of Evidence provides that "[e]very person is presumed competent to be a witness except as otherwise provided in these rules or by statute." "Virtually all witnesses may be permitted to testify: children, mentally incompetent persons, convicted felons." Tenn. R. Evid. 601, Advisory Commission Comment. Rule 603 of the Tennessee Rules of Evidence provides that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully by oath or affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." The common law rule is that if a child witness "understands the nature and meaning of an oath, has the intelligence to understand the subject matter of the testimony, and is capable of relating the facts accurately," the child is deemed competent to testify. *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993); *see also State v. Howard*, 926 S.W.2d 579, 584 (Tenn. Crim. App. 1996), *overruled on other grounds by State v. Williams*, 977 S.W.2d 101 (Tenn. 1998).

At a pre-trial hearing, the trial court questioned the twelve-year-old victim concerning her understanding of the distinction between the truth and a lie. The victim indicated to the trial court that she understood it was important to always tell the truth, particularly in the courtroom, and that "people take an oath to tell the truth." The victim told the trial court that she would "get in trouble" if she told a lie. During questioning by defense counsel, the victim said that she did not know what would happen to her if she told a lie on the stand (this could be interpreted that the victim did not know the consequences of "getting into trouble" if she told a lie), that she did not understand what

type of courtroom she was in, and that she did not know what it meant to be charged with a crime. The victim said that she had never heard the word "perjury."

The trial court found that the victim understood the nature and meaning of an oath, had the intelligence to understand the subject matter of the trial, and was capable of relating facts accurately. Based on these findings, the trial court determined that the victim was competent to testify as a witness. "The determination of the competency of a minor witness is properly a matter within the discretion of the trial court, who has the opportunity to observe the witness 'up close and personal.'" *Howard*, 926 S.W.2d at 584 (citing *State v. Caughron*, 855 S.W.2d 526, 538 (Tenn. 1993); *State v. Braggs*, 604 S.W.2d 883, 885-86 (Tenn. Crim. App. 1980)). The trial court's decision to allow a witness to testify will not overturned absent an abuse of that authority. *Id.*

Defendant points out that the victim could not relay basic information about her life in Tennessee including the name of her school or teacher, or the name of the street or the town in which she lived while in Tennessee. Defendant also highlights certain inconsistencies in the victim's testimony when compared to her mother's, including where Defendant and her mother married and whether or not they were divorced. All of these issues, however, go to the credibility of the witness, and these inconsistencies were explored in depth on cross-examination. The victim's failure to remember certain details or to remember those details correctly does not address the victim's competency to testify but goes to the weight and value of her testimony, which are factors reserved for resolution by the trier of fact.

Based on our review of the record, we conclude that the trial court did not abuse its discretion by allowing the victim to testify. Defendant is not entitled to relief on this issue.

IV. Bifurcated Sentencing Hearing

Relying on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the trial court conducted a bifurcated sentencing proceeding, over the objection of defense counsel, in which the court submitted proposed enhancement factors to the jury for its determination of applicability. Shortly after Defendant filed his notice of appeal on March 10, 2005, the Supreme Court issued its opinion in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005). In *Gomez*, the Supreme Court concluded that Tennessee's sentencing structure "merely requires judges to consider enhancement factors," and unlike the sentencing guidelines struck down in *Blakely*, Tennessee "does not mandate an increased sentence upon a judge's finding of an enhancement factor." *Id*. at 661. Accordingly, the court held that the Tennessee Sentencing Reform Act does not violate the Sixth Amendment guarantee of a jury trial and is, thus, not affected by the *Blakely* decision.

In his appeal Defendant argues that the trial court erred in conducting a bifurcated sentencing hearing, and that the evidence does not support the jury's finding that enhancement factor (5) is applicable beyond a reasonable doubt. *See* T.C.A. § 40-35-114(5). In addition, Defendant argues that, under *Blakely*, if this matter is remanded for a new sentencing hearing without a jury, only prior criminal convictions could be used to enhance his sentence. Defendant asserts that he has no prior

criminal conviction. Accordingly, Defendant submits that he should be sentenced to the minimum sentence for his Class B felony conviction, or eight years. As noted above, in *Gomez*, our Supreme Court held that Tennessee's sentencing procedures are not affected by *Blakely*. *See Gomez*, 163 S.W.3d at 660.

The State concedes that the trial court erred by submitting enhancement factors to the jury, and acknowledges that there is no authority upon which the trial court might rely to conduct the type of bifurcated sentencing proceeding conducted in the case *sub judice*. The State submits that this matter should be remanded for a new sentencing hearing. After a thorough review of the record and the facts and circumstances presented in this case, however, we conclude that the trial court's error in conducting a bifurcated proceeding is harmless error beyond a reasonable doubt and affirm Defendant's sentence of ten years. *See* Tenn. R. Crim. P. 52(a).

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo*. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). Although, in this instance, the trial court erred in submitting certain enhancement factors to the jury, the trial court specifically found upon considering the facts and circumstances of the case and the principles of sentencing, that enhancement factors (5) and (16) were appropriate considerations in determining the length of Defendant's sentence. Thus, our review is *de novo* with a presumption of correctness afforded to the trial court's sentencing determinations.

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d) Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

As a Range I, standard offender, Defendant is subject to a sentence of between eight and twelve years for his conviction of aggravated sexual battery, a Class B felony. T.C.A. §§ 40-35-112(a)(1). In calculating the sentence for a Class B felony conviction, the presumptive sentence is the minimum sentence in the range if there are no enhancement or mitigating factors. *Id*. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum in that range, but still within the range. *Id*. § 40-35-201(d). Should there be enhancement and mitigating factors, the trial court must start at the minimum sentence in the range,

enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. *Id.* § 40-35-201(e).

At the bifurcated sentencing proceeding, the State submitted two enhancement factors for the jury's consideration: enhancement factor (5), the victim was particularly vulnerable because of physical and mental disabilities, and enhancement factor, (16), Defendant abused a position of private trust in a manner that significantly facilitated the commission or the fulfillment of the offense. T.C.A. § 40-35-114(5) and (16). The State relied on the proof presented in its case in chief and argued that the victim's learning disabilities and epilepsy made her particularly vulnerable. The State also argued that Defendant's position as the victim's step-father gave him access to the victim and facilitated the commission of the offense. At the conclusion of the proceeding the jury found that enhancement factor (5) was applicable beyond a reasonable doubt, but not enhancement factor (16).

At a separate hearing, the trial court determined the length of Defendant's sentence. The State relied on the evidence presented at trial and Defendant's presentence report. According to the presentence report, Defendant was forty-nine years old at the time of sentencing. He completed the tenth grade at Jordan Vocational Tech in Columbus, Georgia and subsequently earned his G.E.D. Defendant reported that he had previously worked for three companies as an over-the-road driver, but his employment record was sporadic. Defendant stated that his health was "poor" as a result of back injuries received during a work-related incident. The presentence report does not indicate that Defendant has a prior criminal history.

Cindy Culpepper, Defendant's former wife, testified as a defense witness. She stated that she and Defendant were married for twenty-eight years before they divorced, and they had two children and seven grandchildren. Ms. Culpepper said that Defendant suffered from various health problems. She said that she trusted Defendant with all of the children in the family. Misty Culpepper and Christopher Culpepper, Defendant's children, testified that Defendant was a good father. They both stated that Defendant suffered from health problems and back pain which affected his ability to work and live as actively as he did before his injuries.

Notwithstanding the jury portion of the bifurcated proceeding, the trial court specifically found that enhancement factor (5) and enhancement factor (16) were appropriate considerations based upon the record and the principles of sentencing. The trial court found "that the victim was particularly vulnerable because of her mental disability." As for application of enhancement factor (16), the trial court stated:

> The Court – the jury was unable to reach a yes/no vote [as to application of enhancement factor (16)]. However, if this Court has the ability to weigh that factor, the Court finds that the record supports that, and that this defendant did abuse a position of private trust that he had when he was alone with this child at the time that this happened.

At trial, Jennifer Culpepper testified that her family moved to Tennessee so that S.L. could participate in the special resources classes offered by the Tennessee school system. She said that since the family arrived in Tennessee, the time that S.L. was required to spend in special resources classes was reduced from four hours a day to fifty minutes a day. Ms. Culpepper stated that the extent of S.L.'s attention deficit disorder had not changed since their arrival in Tennessee, but her epilepsy had grown worse, necessitating several hospital stays. Ms. Culpepper said that S.L. had never had any behavioral problems at school.

Enhancement factor (5) requires a finding that the victim was particularly vulnerable to the offense because of, as relevant here, the victim's physical or mental disabilities. *See* T.C.A. § 40-35-114(5). Our Supreme Court has directed that a victim's natural physical or mental limitations may be considered as an enhancement factor when such limitations render the victim particularly vulnerable "because of an inability to resist, a difficulty in calling for help, or a difficulty in testifying against the perpetrator." *State v. Kissinger*, 922 S.W.2d 482, 487 (Tenn. 1996) (citing *State v. Hayes*, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995)). It is the State's burden to prove that the victim's limitations rendered her particularly vulnerable in the case *sub judice*. *State v. Adams*, 864 S.W.2d 31, 35 (Tenn. 1993).

Based on the facts and circumstances presented in this case, we conclude that the record is insufficient to establish that S.L.'s learning disabilities or epilepsy made her particularly vulnerable to the offenses as contemplated in *Kissinger*. The State provided no correlation provided between S.L.'s limitations and her inability to resist, seek help or testify against Defendant, only that she in general suffered from certain medical problems and attended special resources classes. S.L. was able to tell her mother about the incidents shortly after they occurred, and she testified competently at trial against Defendant.

The record does support, however, the trial court's consideration of enhancement factor (16), Defendant abused a position of private trust, and that position significantly facilitated the commission or the fulfillment of the offense. Defendant was S.L.'s stepfather and her sole caregiver while her mother worked during the day. Defendant's status as the victim's stepfather provides a sufficient basis for the application of enhancement factor (16). *See Kissinger*, 922 S.W.2d at 488 (listing step-parent as a position which can trigger application of enhancement factor (16)).

The misapplication of one enhancement factor, however, does not necessarily lead to a reduction in a defendant's sentence. *State v. Winfield*, 23 S.W.3d 279, 284 (Tenn. 2000). In *Gomez*, our Supreme Court concluded that "[t]he Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." *Gomez*, 163 S.W.3d at 661 Upon the finding of even one enhancement factor, "the statute affords to the judge discretion to choose an appropriate sentence anywhere within the statutory range." *Id*. at 659.

Based upon the presence of one enhancement factor and no mitigating factors, we conclude that the trial court did not err in sentencing Defendant to ten years for his aggravated sexual battery conviction. Thus, any error in conducting a bifurcated sentencing hearing was harmless error beyond a reasonable doubt. *See* Tenn. R. Crim. P. 52(a). Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

_____

THOMAS T. WOODALL, JUDGE